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Current Topics.

Solicitors in War Time.

THAT the present "deferment procedure" for solicitors and their clerks who are called up to serve in the Forces is cumbersome and ineffective, was the theme of a letter to *The Times* of 27th January from Mr. A. G. ALLEN. The writer drew attention to the client's peculiarly urgent need of his solicitor in these days of exceptional strain, more particularly owing to the volume and complexity of new laws, orders, and regulations and Government activities under them. It was, he said, a futile waste of the country's resources and a lamentable lack of planning for skilled legal technicians of, say, thirty-five years or older to be conscripted into the ranks of the Army and there allocated into secondary tasks which could be as well performed by unskilled labourers. The letter was followed in *The Times* of 29th January by one from Mr. ROBERT C. NESBITT, formerly a member of the Council of The Law Society, who wrote that the Council, while not desiring that solicitors of twenty-five should be placed in the schedule of reserved occupations—as in the case of other professions—had sought to have each case of deferment considered on its merits. He suggested a return to the "rapid and effective" procedure during the last war, when Deferment Committees had power to act subject to appeal. The present position is that Deferment Committees only have power to make recommendations to the Lord Chancellor, who then advises the Minister of Labour. The suggestion is entitled to careful consideration by those in authority, as it comes from a lawyer with experience as chairman of a Deferment Committee in the last war and as a member of a Deferment Committee in the present war. While it is recognised that the needs of the Forces must be paramount at the present juncture, it should also be borne in mind that the civil population are entitled to every assistance that the legal profession can give in understanding their rights and duties. Moreover, the depletion of the ranks of the profession will cause delay in collecting state revenues for which solicitors are responsible. It is therefore satisfactory to note from the opening address of the President of The Law Society at its special general meeting on 24th January that negotiations were continuing between the Council, the Lord Chancellor's Department and the Ministry of Labour with a view to mitigating the severity of the situation.

"Charity" and the Internal Combustion Engine.

A BEQUEST for the furtherance of "scientific, medical or mechanical research or invention" was held by Mr. Justice FARWELL on 29th January to be intended for educational purposes and therefore a valid charitable gift. His lordship said in the course of the hearing (according to *The Times*, 30th January): "Some of us think that the world has by no means benefited from the invention of the internal combustion engine, but I am not sure that this is a good ground for holding that a bequest of this kind is not charitable." As recently as 1891, in the leading authority of *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, it was possible to argue, and even to hold, as LORD HALSBURY, L.C., and LORD BRAMWELL did in their dissenting judgments, that a charitable purpose was "where assistance is given to the bringing up, feeding, clothing, lodging and education of those who from poverty, or comparative poverty, stand in need of such assistance." LORD MACNAGHTEN, however, in his wise and witty judgment, said that the word "charity" had a technical meaning not depending on the popular use of the word. He illustrated this by re-telling Oliver Goldsmith's story of the miserly French priest, nicknamed "The Griper," who saved so much money that he was able to lay out an aqueduct for the benefit of the poor people of Rheims, who had previously been obliged to buy water at a high price, "by which he did the poor more useful and lasting service than if he had distributed his whole income in charity every day at his door." He adopted the well-known classification in the Act of Elizabeth (43 Eliz., c. 4), viz., the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community. The vagueness of the phrase "beneficial to the community" has led to a spate of litigation. Some judges have even thought, like LORD ROMILLY in *Thornton* v. *Howe* (1862), 31 B. 14, that every gift which, in the opinion of any testator or testatrix, however foolish, could carry out an object which the court considered charitable, must also be held to be charitable. It is interesting to note that although scientific research has often received the blessing of the courts, in spite of its debatable benefit to humanity, a gift "to encourage artistic pursuits or assist needy students in art" was held void in *Re Ogden* (1908) 25 T.L.R. 382.

Uniformity of Sentence.

THE criticism of magistrates' sentences for their lack of uniformity, more particularly in regard to motoring offences, deserves consideration in regard to the various breaches of the Defence (General) Regulations, 1939, that have recently become a "feature" of the police courts. In three specific instances taken at random, at Beckenham, Cambridge and Eastham on 10th, 14th and 16th January, defendants were fined £15, £10 and £4 for infringements of the Food (Conditions of Sale) Order, 1939. A fine of ten shillings was imposed in respect of a similar infringement at Bury St. Edmunds on 1st August, 1940 (84 SOL. J. 531). Practitioners in the police courts could no doubt furnish instances from their own experience, particularly in the case of breaches of the lighting regulations. To some extent the criticism is superficial, as it tends to ignore the different circumstances of different cases involving the same charges, differences which frequently cannot be conveyed in a necessarily brief newspaper report. The Legislature has wisely permitted a wide range of sentences by imposing a maximum penalty without any minimum, and has even permitted the discharge of defendants under the Probation of Offenders Act, 1907. On the other hand, the fact that magistrates, and judges too for that matter, inevitably vary in their ideas as to what is a fair sentence, is to some extent a source of grievance. If the prosecution feels any dissatisfaction with the sentence, the matter may occasionally be rectified as it was in *White* v. *Hurrell's Stores, Ltd.* (*The Times*, 17th January), where the court remitted for

sentence a case of a breach of para. 8 of the Rationing Order, 1939, which the magistrates had dismissed under the Probation of Offenders Act, 1907. Defendants, however, can rarely, if ever, appeal to the Divisional Court on questions of sentence, and are deterred from appealing to quarter sessions by the expense and the possibility of an increase of sentence. Frequently, the danger lies as much in uniformity of sentence as in lack of uniformity. In his book "Crime and the Community," Mr. LEO PAGE cites the case of a magistrate who announced with regard to a motoring offence in respect of which a large number of summonses had been issued: "The penalty for this offence is two pounds, with seven days in which to pay." Mr. PAGE suggested that the remedy lay in the study of penology by magistrates, but in the absence of this, much good would no doubt result from free discussion of the subject at magistrates' conferences.

Poor Persons Divorce.

THE gratuitous services given by both branches of the legal profession for the assistance of the poor has often been the subject of well-merited compliment from judges and others. The President of the Probate, Divorce and Admiralty Division not long ago said, in the course of a judgment: "Both parties are suing under the Poor Persons Procedure, and I have had reason over and over again to express the gratitude of the judges, in this Division in particular, to those who conduct this litigation. I say 'in particular' because, as is well known, at least four-fifths of the work of the Poor Persons Procedure is in connection with litigation in this Division, and it is impossible to exaggerate the importance of the services which both branches of the profession render to the public in this way." In 1937, to take a recent typical year for which figures are available, out of a total of 2,440 of poor persons proceedings begun, 2,216, of which 2,145 were matrimonial, were successful. Forty-two per cent. of the divorce cases disposed of during the year were poor persons' cases. There can be little doubt existing among those with any experience of these cases that both solicitors and counsel do the work with the same conscientious care that they bestow on paid work. There are well-known counsel to-day who built the beginnings of their practices solely on the ability they displayed in poor persons' divorces, and there are cases in the reports in which judges have gone out of the way to compliment counsel on their brilliant arguments in such cases. It is therefore unfortunate that a speaker at The Law Society's special general meeting on 24th January should have said that petitions were often settled by inexperienced counsel using out-of-date forms, and were wrongly conducted in court so as to cast an undeserved reflection upon the solicitor. This statement cannot be endorsed by the majority of solicitors conducting these cases, who co-operate admirably with counsel in the performance of a notable public service. The speaker moved that a further £5 should be paid to the solicitor in each case by the poor person in addition to any disbursement now permitted. Among those who opposed the motion was Mr. E. A. WILLIAMS (Secretary of the Herts Law Society and of its Poor Persons Procedure Committee), who said that the sum proposed was too small to make any difference, and that the motion would deprive solicitors of their claim that the legal profession was the only one to provide the services of its members free to the very poor under a regular system. The motion was lost by five in favour to twenty-three against.

The War Damage Bill.

IT is good to have the Chancellor's promise to study carefully all that was said at the committee stage of the War Damage Bill on 29th January with regard to cl. 4, which provides that payments are to be either of cost of works or by reference to value. An amendment had been proposed which would have the effect of making the basis of the value payment prices current after the execution of the works, instead of those prevailing on 31st March, 1939. The difficulty, as was pointed out in debate, is that if a proprietor wishes to rebuild, the cost, even at the present time, would be at least double the value payment he would receive under cl. 4 as it stands at present. Some speakers suggested that a specified percentage over the 1939 value should be given to persons undertaking to rebuild. The Chancellor admitted that great injustices and hardships would be caused if there was a great change in money values after the war. The Chancellor's assurance that he would see if there was anything that could improve the position will be welcome, especially in view of the general feeling that some change in money values after the war is inevitable. Another satisfactory result of the debate with regard to the value payment arose on consideration of an amendment moved by Sir HERBERT WILLIAMS to provide that the rate of interest accruing on a value payment from the time of the occurrence of the war damage should be 4½ instead of 2½ per cent. The object of the amendment was to meet the case of persons who had to continue to pay mortgage interest while only receiving 2½ per cent. from the Government. The amendment was, by leave, withdrawn on the Chancellor's statement that some machinery must be set up under another Bill to take into account all the circumstances of individual cases. No doubt the respective interests of mortgagee and mortgagor must be balanced, and the State or the Commission should not be obliged to pay more than the rate of interest on State borrowings generally, but the large number of persons with mortgages on their houses who will suffer if the position is left as it is under the Bill render imperative new legislation and machinery for examining their cases.

Reconstruction and Land Speculation.

AS announced in these columns last week, Mr. Justice UTHWATT has been appointed chairman of a committee to deal with reconstruction and land speculation. The other members of the committee are Mr. GERALD EVE, Mr. JAMES BARR, Mr. F. R. EVERSHED and Mr. JAMES WYLIE. The terms of reference are: "To make an objective analysis of the subject of the payment of compensation and recovery of betterment in respect of public control of the use of land; to advise, as a matter of urgency, what steps should be taken now or before the end of the war to prevent the work of reconstruction thereafter being prejudiced. In this connection the committee are asked: to consider (*a*) possible means of stabilising the value of land required for redevelopment; and (*b*) any extension or modification of powers to enable such land to be acquired by the public on an equitable basis; to examine the merits and demerits of the methods considered; and to advise what alterations in the existing law would be necessary to enable them to be adopted." In announcing the appointment of the committee in the House of Lords on 29th January, LORD REITH said that the committee would not deal with policy issues. VISCOUNT MAUGHAM, however, said that he could not conceive any matters which came before the committee which did not raise "matters of policy." He hoped that the Government would enlarge upon or explain the phrase. LORD REITH replied that he was sure that VISCOUNT MAUGHAM would appreciate the meaning of the phrase in the terms of reference "an objective analysis." The terms of the reference, he said, had been drawn up in consultation with the learned chairman of the committee and were satisfactory to him. None can doubt the necessity for a preliminary objective analysis of the position before any decision as to policy can be taken, if reconstruction after the war is not, to use the words of LORD REITH, to be "hampered, prejudiced or delayed."

Justices Equally Divided.

WHEN application was made on 17th January to the Dereham justices for an occasional licence from 8 p.m. to 1 a.m. on the occasion of a dance at the Theatre Royal, Dereham, in aid of a benevolent fund, the chairman announced that it would be granted by the barest majority. Two of the magistrates protested on the ground that a majority of the bench did not approve. The chairman replied that it was on the advice of the clerk, and the police did not object. He added that if the chairman had not a casting vote, he should have. There were six magistrates sitting, and three were in favour of and three against granting the application. The report of this case, for which we are indebted to the *Eastern Daily Press* of 18th January, discloses some irregularity of procedure. Section 7 of the Licensing (Consolidation) Act, 1910, provides that where any power or duty is exercised or performed by licensing justices or the borough justices, it may be exercised or performed by a majority of the justices present at a meeting assembled for the purpose. It is quite clear from this as well as from reported decisions (*Garton* v. *Southampton JJ.*, 57 J.P. 328, and *R.* v. *Surrey JJ., ex parte Crosfield* [1921] 1 K.B. 485), that the chairman has not the power of exercising a casting vote. The only case in which the chairman has a casting vote is that of the chairman of the joint committee under s. 4 (7) of the Licensing (Consolidation) Act, 1910, i.e., the confirming authority under s. 2 (3) (*b*) (i) of the Act. There is no other case in which a chairman of a bench has a casting vote, and in criminal matters it is particularly important that the judgment should be either unanimous or the opinion of the majority. If there is an even number of justices present and an equal division of opinion the proper course is to adjourn the case in order to reconstitute the court (*R.* v. *Herts JJ., ex parte Larsen* [1926] 1 K.B. 191). In such cases, however, a justice may retire or withdraw his opinion, leaving a majority judgment to prevail. The important thing is that the judgment of the magistrates, whether as to verdict or sentence, should be that of the majority, if not entirely unanimous.

No Concluded Contract.

Scammell v. *Ouston* (1941), 1 All E.R. 14, is a salutary decision of the House of Lords, explaining and distinguishing *Hillas and Co., Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503. In the *Hillas Case*, a contract for the supply of Russian soft-wood timber in 1930, at agreed prices, less agreed discounts, gave the buyers an option to buy a further 100,000 standards in 1931. The contract was precise; the option was vague: no kinds, sizes or qualities were specified; no dates or ports of shipment or discharge were defined. The House held that no further agreement was necessary; the terms of the option were inherent in, and could be implied from, the terms of the 1930 contract; the court could spell out the terms of the option and identify a fair specification and a fair distribution. On the other hand, in *Scammell* v. *Ouston*, where the parties had agreed that the balance of the price of a lorry was to be paid "on hire purchase terms" which were never finally settled, the House held that there was no concluded contract; the expression was too vague; the court could not construct a contract for the parties and could not, of itself, define the normal terms of a hire-purchase agreement which the parties had intended, one day, to settle between them.

It is interesting and significant to observe that in the *Hillas Case*, MacKinnon, J. (who sat with a City of London special jury), had pronounced for the validity of the option as a contractual agreement; his judgment was reversed by the Court of Appeal and restored by the House of Lords. In *Scammell* v. *Ouston*, the Court of Appeal (which included MacKinnon, L.J.) decided that the parties knew quite well the type of agreement contemplated; this view was reversed by the House. In the *Hillas Case*, Lord Wright extended the implication in business contracts of what was reasonable, in order to give business efficacy to the contract; in *Scammell* v. *Ouston*, Lord Wright said that the language used by the parties was so obscure, so indeterminate, that the court could not attribute to the parties any particular contractual intention. His reasoning in this case bears a striking resemblance to the reasoning of Scrutton and Greer, L.JJ., in the *Hillas Case* ((1932), 147 L.T. 504–510, at pp. 506, 508, 509), which, rejected though it was, has always appeared to the writer—with the greatest respect to the opinions of the House of Lords—to be more consistent with the principles of the law of contract. They held that, considering the number of things left undetermined—kinds, sizes, quantities, times, ports and manner of shipment—the option was not an agreement but an unenforceable agreement to make an agreement.

The facts, the arguments, and the judicial views which have been reversed, are shortly set out in the speech of Lord Russell of Killowen, and in the opinion of Lord Wright at greater length.

The question was this: was there a concluded contract, or not? The respondents had claimed damages for breach of contract. The main defence was that no contract arose out of the letters or interviews. Tucker, J., and Slesser, MacKinnon and Goddard, L.JJ., decided—"for reasons which present an embarrassing diversity," Lord Wright observed—that, as a matter of construction, a contract had been concluded; the House of Lords held otherwise.

In November, 1937, Ouston, a firm of house furnishers, desired to acquire a new motor van for their business. Scammell quoted £268 for a Commer 15-cwt. chassis complete with special Scammell body; against this, they would allow Ouston £100 for their 1935 Bedford van. The quotation was by letter; Ouston, at a conversation with the general sales manager, placed the order. The order was confirmed by Scammell's letter of 7th December, 1937, which asked for Ouston's official order, stating that delivery could be made before February, 1938. On 8th December, Ouston replied, acknowledging receipt of the acceptance of the order, and saying: "This order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over a period of years." This was the crucial sentence around which all the argument revolved. During all the conversations, Ouston had made it clear that a hire-purchase agreement was essential; there was no question of an out-and-out purchase. No terms, however, of such an agreement had been settled or even discussed. In January, 1938, Scammell wrote to Ouston that the United Dominions Trust Co., Ltd., a finance company, had accepted the hire purchase in connection with the vehicle, and that the documents would be forwarded. On 10th February, 1938, Scammell reported that the van would be ready in a few days "subject to mutual acceptance of the hire-purchase agreement." Scammell then inspected the Bedford van; reported unfavourably upon it and stating that it was a 1934 vehicle; and wrote that since it did not fulfil the contract conditions, Ouston should dispose of it locally. After much correspondence, Ouston, in May, 1938, issued a writ against Scammell, claiming damages for breach of contract to supply a Commer chassis complete with body, and to accept a Bedford van in part exchange. It was pleaded in the defence that the alleged agreement was subject to a condition as to hire-purchase terms: until a hire-purchase agreement mutually approved was effected, neither party was bound; no such agreement was in fact effected.

Tucker, J., found that Scammell, by their letter of 14th February, 1938, had repudiated the contract, and he awarded Ouston damages for breach of contract. He held that the stipulation as to a hire-purchase agreement was merely a condition precedent; the vendors, by wrongly repudiating the contract, had relieved the purchasers of proving that the condition precedent had been fulfilled.

The Court of Appeal, for differing reasons, affirmed the judgment ([1940] 1 All E.R. 59). Slesser, L.J., said that it was for the purchasers, within a reasonable time and in a reasonable way, to produce some method of satisfying their undertaking through a hier-purchase agreement, to pay the sellers (at p. 64). The terms of the agreement could be settled in conjunction with a third party. It was for the purchasers to procure the agreement, but the repudiation by the sellers relieved the purchasers of proving that they had fulfilled this condition. According to MacKinnon, L.J., the duty of procuring the agreement lay upon Scammell. The parties knew what type of agreement with the finance company was contemplated: even though it might have been in one of a few forms; either of the variant forms, if in a reasonable form, would have sufficed (at p. 66). The contract was not for the sale of goods, but to procure the finance company to buy for Scammell a car, and let it to Ouston on hire-purchase terms. A draft agreement had in fact been prepared, but was never signed; it was not, however, in evidence and was immaterial, said Lord Wright; moreover, it was incomplete and many doubtful points had not been settled. Goddard, L.J., agreed that Scammell must procure the agreement with the finance company: as long as they submitted to Ouston a hire-purchase agreement giving two years' credit for £168, Ouston must take the car; the exact terms of that agreement did not matter to them, nor in these terms would they have a say (at p. 67).

In the House of Lords, the case was put in different ways by leading and by junior counsel for Ouston, the respondents. First, it was argued that there was a contract of sale, subject to a condition precedent—or a stipulation in the contract—that the balance of the price could be had on reasonable hire-purchase terms. The agreement was put by junior counsel not as a contract of sale, but as a contract defeasible if Ouston could not secure financial aid on hire-purchase terms, provided that Scammell could compel Ouston to take delivery if Scammell could show that hire-purchase finance was available. Agreement between the parties on the terms of this finance was immaterial. "An alleged contract," said Lord Russell of Killowen, "which appeals for its meaning to so many skilled minds in so many different ways is undoubtedly open to suspicion" (at p. 20).

The House of Lords held that there never was a concluded contract between the parties. The concluding sentence of the letter of 8th December, 1937, Lord Russell declared, was not a condition precedent to any contract, but merely a recording of the common intention of the parties, stipulating, for the first time, a two-years' period.

Upon two grounds, said Lord Wright, there never was a contract. First, the language was so obscure and indefinite that no particular contractual intention could be inferred.

> "The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. . . . The test of intention, however, is to be found in the words used. If these words, considered however broadly and technically [?], and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract" (at pp. 25, 26).

In the present case, the bargain was "too vague"—as was manifest from "the startling diversity of explanations." The terms were not "reasonably certain."

Secondly, the parties had never advanced beyond the stage of negotiation: no agreement was ever reached: "the furthest point they reached was an understanding or agreement to agree upon hire-purchase terms." Lord Dunedin's *dictum* is cited from *May & Butcher, Ltd.* v. *The King* [1934] 2 K.B. 17, 21*n*:—

> "To be a concluded contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing

to be settled by agreement between the parties. Of course, it may leave something which still has to be determined, but there that determination must be a determination which does not depend upon an agreement between the parties."

In that case, the contract provided that the prices of the old tentage were to be agreed upon by the parties, from time to time, as the quantities became available. The parties could not, in fact, agree.

Scammell, in their letter of 10th February, 1938, had stated that the transaction was subject to mutual acceptance of the hire-purchase agreement. Such an agreement, Lord Wright pointed out, is a contract not of sale but of bailment. The owner lets the chattel on hire for a periodic rent; on completion of the agreed payments and compliance with the conditions the hirer has the option of buying the chattel on payment of a nominal sum: he does not become owner automatically on completion of the payments (see *Helby* v. *Matthews* [1895] A.C. 471, 475, *per* Lord Herschell, L.C.) What would be "the price" is increased by a sum to cover interest and bank charges. Terms are necessary as to user, repairs, insurance, repossession and other matters; the agreement is "in practice a complex arrangement." Lord Wright proceeded to explain the various methods in which the transaction might have been carried out. A tripartite agreement would have been necessary. The terms of the agreement were of joint concern to the three parties. The crucial sentence of the December letter probably meant "an announcement that the deal is only to proceed upon a hire-purchase basis, the parties anticipating that the terms of such an agreement would be settled between them in due course" (at p. 28).

Now in the *Hillas Case* the contractual intention was clear. By the implication of what was "just and reasonable," the court could fill in the missing details—already to be gathered from the contract. Thus, also, the court may determine reasonable price, reasonable time, reasonable instalments. "The parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion . . . It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects . . ." But the court cannot "make a contract for the parties, or [to] go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail" (147 L.T., at p. 154). But the present would be a case of making an entire contract for the parties.

> "The law has not defined, and cannot of itself define, what are the normal and reasonable terms of a hire-purchase agreement; though the general character of such an agreement is familiar, it is necessary for the parties in each case to agree upon the particular terms" ((1941), 1 All E.R., at p. 29).

As a matter of practice, it will depend upon the construction of the terms of the agreement in the light of its surrounding circumstances whether there is a concluded contract or not. The House of Lords, in *May & Butcher, Ltd.* v. *The King* [1934] 2 K.B. 17*n*, did not intend to lay down a universal principle of construction.

> "It must be in each case a question of the true construction of the particular instrument,"

observed Lord Wright in the *Hillas Case* (147 L.T., at p. 517). Yet, on comparing the speeches of Lord Wright in the *Hillas Case* and in *Scammell* v. *Ouston* the inference is irresistible that the House has, in effect, re-affirmed the fundamental principle that where there remain essential terms not agreed between the parties, there is no concluded contract. This was the view of Scrutton and Greer, L.JJ., when the *Hillas Case* came before the Court of Appeal (and see the critical comments of Scrutton, L.J., in *Foley* v. *Classique Coaches, Ltd.* [1914] 2 K.B. 1, 9, 10, upon the difficulty of reconciling the *Hillas Case* with *May & Butcher* v. *The King*). The observations of Mackinnon, L.J., therefore, in *Ouston* v. *Scammell* (1940), 1 All E.R. 59, 65, 66—in particular the observation that this was "a perfectly simple and ordinary business agreement" (at p. 65)—must now be regarded as too wide. To repeat the crystalline words of Viscount Dunedin:—

> "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled by agreement between the parties" ([1934] 2 K.B., at p. 21).

According to the *London Gazette* of January 30th, the title taken by Sir Frank Boyd Merriman, President of the Probate, Divorce and Admiralty Division, will be Baron Merriman, of Knutsford, in the County Palatine of Chester.

Criminal Law and Practice.

Death of a Magistrate.

At the North London Police Court on 23rd January the stipendiary magistrate, Mr. Frank Powell, referred to the effect which the recent death of Mr. Basil Watson, K.C., who had previously sat as magistrate at that court, had upon certain pending proceedings.

He said that there were several cases in the list in which those who were charged pleaded "Guilty" or were convicted by the late Mr. Basil Watson, and the question arose whether he (Mr. Powell) had any jurisdiction to perform any act in regard to those cases. It might be that the death of a metropolitan magistrate rendered previous proceedings null and that the convictions already recorded were technically the act of the court as distinct from the act of the particular magistrate trying the cases, or it might be that no other magistrate had jurisdiction later to try such a case (*The Times*, 24th January).

The matter was argued in a specific case which came on the following day at the same court before Mr. Brodrick (*The Times*, 25th January). It was submitted on behalf of the metropolitan police that there were two separate processes of law, one of conviction and one of sentence, and when a man was convicted, the same court, although differently constituted, could pass sentence. The magistrate held that he had no jurisdiction and the defendant was discharged.

So far as preliminary acts in summary proceedings are concerned, such as receiving an information or complaint or issuing a summons or warrant, such acts may be performed by one justice even where the information or complaint must be heard by two or more justices, and that justice need not be one of the magistrates who actually hears the case (s. 29, Summary Jurisdiction Act, 1848). Where, however, any statute requires that an information or complaint must be heard and determined by two or more justices, or that a conviction or order should be made by two or more justices, such justices must be present and acting together during the whole of the hearing and determination of the case (*ibid.*).

Moreover, it is expressly provided by s. 37 of the Summary Jurisdiction Act, 1879, that a warrant or summons issued by a justice of the peace under the Summary Jurisdiction Act, 1848, or any other Act, or otherwise, shall not be avoided by reason of the justice who signed the same dying or ceasing to hold office.

There are two important decisions to which reference should be made on the question of proceedings which are interrupted by a magistrate's death or illness. In *In re Guerin* (1888), 58 L.J.M.C. 42, evidence was heard for six days on an application for a writ of *habeas corpus* to bring Guerin out of custody. It was alleged that he had committed larceny in France, and his extradition had been demanded. A question arose as to his nationality and the case was remanded for evidence as to this to be called. This evidence was later heard by another magistrate, who issued a warrant for Guerin's extradition.

Wills, J., said that the proceeding was contrary to justice, as it could only be satisfactorily conducted by one who had heard the case throughout. He quoted from *R.* v. *Bertrand*, L.R. 1 P.C. 520, where Coleridge, C.J., said that the most careful note could not convey the evidence fully in some of its most important elements—the look or the manner of the witness, his hesitation, his doubts, his confidence or precipitancy, his calmness or consideration, his manner on a statement of any particular moment. It was the dead body of the evidence without its spirit. The application for the writ was granted.

These observations of Coleridge, C.J., were again referred to by Phillimore, J., in *Ex parte Bottomley* [1909] 2 K.B. 15. In that case several persons were charged with conspiracy to defraud. After the evidence of a large number of witnesses had been heard, the magistrate fell ill and could not continue the hearing. A re-hearing was commenced before another magistrate and counsel proposed to recall some of the witnesses, re-swear them, read to them the depositions which had been taken, ask them to correct their statements where they appeared to be inaccurate, and ask any further necessary questions. He proposed then to tender them for cross-examination, with liberty to re-examine. The remainder of the witnesses would then be called in the ordinary way.

Phillimore, J., said that there was no authority that this was a wrong course. The main objection was that the procedure involved putting long leading questions to the witnesses. According to "Stephens' Digest of the Law of Evidence," 6th ed., art. 128, p. 146, leading questions could be put in examination-in-chief and in re-examination only with the leave of the court, but could be put in cross-examination without such leave. Other authorities showed that there

was no objection to a long leading question. His lordship held that it was a matter for the discretion of the court in a preliminary hearing, and was to be exercised in the best interests of justice. He distinguished *In re Guerin*, *supra*, and *R.* v. *Bertrand*, *supra*, the latter on the ground that a jury at a murder trial had disagreed and notes of evidence taken at the first trial were read over to the jury at the second trial. Both that and *In re Guerin* were somewhat different from the present case.

Ex parte Bottomley is a difficult case to reconcile with previous authorities, and it certainly appears to be stretching a point to call the reading of a long deposition and then asking whether it is correct a long leading question. Be that as it may, s. 29 of the Summary Jurisdiction Act, 1848, requires all the justices required to hear and determine a case to be present and acting together during the whole of the hearing and the determination of the case—and the determination, it is submitted, includes sentence. This rule, it is submitted, applies to metropolitan police magistrates and stipendiary magistrates with equal force, having regard to s. 33 of the Summary Jurisdiction Act, 1848, which empowers a single metropolitan police magistrate or stipendiary magistrate to do alone whatever the Act authorises one or more magistrates to do. (See also the Metropolitan Police Courts Act, 1839, s. 14, and the Stipendiary Magistrates Act, 1858, ss. 1 and 2.)

One further point in relation to this difficult question deserves particular consideration. Mr. Brodrick said, at North London, on 24th January, that this matter had been a thorn in the side of magistrates ever since the cases of *Sheridan* and *Grant* (1936), 2 All E.R. 883, 1156; 80 SOL. J. 535. These decisions were directed to the somewhat difficult question whether a person found guilty by petty sessions of the offence of obtaining credit by false pretences or fraud from A contrary to s. 13 of the Debtors Act, 1869, could be committed to quarter sessions and a charge added of obtaining credit from B, when the justices had heard his criminal record. Humphreys, J., said that the offence of which he had been found guilty was precisely the same and based on the same facts as that charged in the added count, and therefore the plea of *autrefois convict* was good. "Conviction," according to such authorities as *R.* v. *Blaby* [1894] 2 Q.B. 170, and *R.* v. *Miles*, 24 Q.B.D. 423, meant plea of guilty or a finding of a verdict of guilty, and did not include sentence. These cases decide that a person has been convicted if he has been found guilty or has pleaded guilty. The difficulty, therefore, in which a magistrate finds himself when he succeeds to a case in which a magistrate has heard the evidence and found a verdict of guilty or taken a plea of guilty and died before awarding sentence, is as follows: He cannot follow the course pursued in *R.* v. *Bottomley*, *supra*, without being confronted with the plea of *autrefois convict*. On the other hand, he cannot proceed to award sentence without, it is submitted, offending against ss. 29 and 33 of the Summary Jurisdiction Act, 1848. The result is, as Mr. Brodrick found, that certain undeserving convicted persons must escape sentence. This is clearly a matter for the attention of the Legislature as soon as parliamentary time is available.

A Conveyancer's Diary.

1940 Chancery.—III.

Re Beckett [1940] Ch. 279, opens up a curious line of inquiry which is not without some practical importance. The daughter of the settlor married one, Davison, in 1919, and had issue of this marriage three daughters, all of whom, when the case came on, were, of course, still infants. In 1926 the settlor made a settlement under which the trustees were to stand possessed of a certain fund on the ordinary trusts for sale and investment, and (so far as now material) on trust as to the income during the life of the settlor's daughter on discretionary trusts for a class, consisting of the daughter and all the issue by her then subsisting or any later marriage. As to capital, the settlor had a power to appoint, but he died without exercising it, and in default of appointment the fund was to go equally among all the children of the daughter who should survive their mother and should attain twenty-one or, being female, marry under that age. The settlement contained no power of advancement, but the statutory power obviously applied to it.

The daughter's marriage was dissolved in 1928 and she married again in 1929. Of the second marriage there had been no issue. In 1937 the settlor died, leaving a will made in 1932, the contents of which are set out in the report, but their relevance to the reported point is not apparent.

The eldest daughter of the first marriage of the testator's daughter was going to be married, and there was to be a settlement, validated under the Infants' Settlements Act, 1855. The trustees of the 1926 settlement wished to make an advance to the infant to put her in funds for the purpose of settling them. The question was what, if any, consents were necessary to the exercise of the statutory power of advancement, having regard to the fact that the infant's capital interest trust was subsequent to the discretionary trust.

Proviso (*c*) to the Trustee Act, s. 32 (1), is as follows: "Provided that . . . (*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment."

Simonds, J., said that he could give no meaning to the words "in existence," since a person not in existence could not be entitled to an interest. The main point, however, was whether the objects of a discretionary trust were or could be persons having an interest in the money to be advanced. If they were, of course, no advance could have been made in this case since three objects of the discretionary trust were infants, and the proviso makes impossible an advance to the detriment of an infant entitled to a prior interest. The operative words of his lordship's judgment were as follows: "I think, according to the ordinary language of conveyancing, and that is what I have to bear in mind for the purpose of construing the statute, it would not be right to predicate of a person who is the object of a discretionary trust that he is entitled to a vested or contingent interest in the trust fund. . . . I do not think that it would be right to impute to any settlor, where there is in the first place a discretionary trust embracing a wide number of objects, and there is also a power of advancement, the intention to fetter the discretion of the trustees with regard to advancement by imposing on them the obligation to obtain the consent of all the persons, many of them, perhaps, infants and unable to give their consent, who were interested under the terms of the discretionary trust" (at pp. 285–6). The learned judge might have added that, in the present case, there were possible objects of the discretionary trust not yet *in esse*, viz., future children of the settlor's daughter, whose inclusion among the objects of the discretion would have made an advance totally impossible if objects of such a trust are within proviso (*c*) at all and if any meaning could be given to the words "in existence."

This decision is entirely practical and convenient. But I am not sure that we can take it as being of universal application. The learned judge expressed himself absolutely, and brushed aside the argument that *Re Smith* [1928] Ch. 915 establishes that if all the possible objects of a discretionary trust are *in esse* and *sui juris*, the trustees must deal with the fund according to the unanimous direction of the objects. In such a case it is pretty clear that each and every object *has* an interest in the fund, and I should have thought it would be difficult for the trustees to exercise the power of advancement without the unanimous consent of all the objects. Such a state of facts is, however, comparatively rare, and was plainly not relevant to the facts of *Re Beckett*. But we should be wise in treating *Re Beckett* as an authority not covering the case where the prior discretionary trust has reached the position discussed in *Re Smith*.

Learned counsel stated in argument in *Re Beckett* that the question under consideration "would have arisen in *Re Stimpson's Trusts* [1931] 2 Ch. 77," but for the fact that the tenant for life whose interest was forfeitable on alienation agreed to consent to an advance, whether or not his interest was forfeited. It is not clear to me that this observation was correct. In *Re Stimpson* (unlike *Re Beckett*, where the prior interest was a discretionary trust) the person presently entitled was a life tenant whose interest was defeasible if he assigned it or did any of the other things usually referred to in these defeasible life interests. Subject thereto, there was a discretionary trust for the ex-life tenant and his issue. The point on which the case is reported was whether the statutory power of advancement applies to land held on trust for sale with no trust for re-conversion, which it was held to do. But it appears from the statement of facts (at p. 79) that Luxmoore, J., at an earlier hearing held that if the life tenant consented to the exercise of the power he would forfeit his life estate. No reasons are given. The summons was adjourned for the life tenant to consider his position, and he agreed to consent whether his life interest was forfeited or not. Now, if this decision was right at all (and without the reasons for it one can hardly feel confident that it was), it would still not be correct to say that the life tenant's decision to consent prevented the *Re Beckett* point from arising. On forfeiture the discretionary trust would have come into force, and its objects were the life tenant himself and his issue. Actually he had issue only one person, and that person was *sui juris*, but at any time other children or grandchildren might well have been born. It would therefore be truer to

say that in *Re Stimpson* the same point as that in *Re Beckett* would have arisen on a forfeiture but was overlooked.

Re Stimpson is, however, important because of the most unfortunately reported decision about the effect of consent on a protected life tenant. If the proposition is good law it would mean that it is never right for a settlor to leave the statutory power of advancement to operate unaltered where he is creating a protected life interest, as to do so would either render the power nugatory or make it effective at the cost of a most unfair sacrifice on the part of the life tenant. The learned editors of "Underhill on Trusts" (9th ed.) at p. 392, draw attention to *Re Stimpson* as being important, but seem rather doubtful about it, since they say that consent "may" give rise to a forfeiture. I do not think such a statement is strong enough. If *Re Stimpson* is right consent *does* give rise to a forfeiture. *Re Stimpson* may be wrong, and this point ought emphatically not to have been reported in the scanty way in which it was, but at present it has not been overruled, and it would be madness for the draftsman of a new settlement to take a chance on its being wrong. All that is necessary is to insert a clause saying "the statutory power of advancement applies hereto, but nothing in s. 32 of the Trustee Act shall make necessary the consent of any person entitled to a defeasible life interest to an advance thereunder." Or more simply one can insert after the words of defeasance in the life interest itself "(other than any consent to any advancement)."

The learned editors of "Wolstenholme" (12th ed.), p. 1320, deal with this matter even less satisfactorily. They say: "A tenant for life whose interest is given over on assignment can give his consent, but by consenting he may (query) forfeit his interest (*Re Stimpson* [1931] 2 Ch. 77); but usually the consent does not give rise to a forfeiture (*Re Hodgson* [1913] 1 Ch. 34)." Coming, as this observation does, in a note on the Trustee Act, s. 32, it is doubly misleading. First, it suggests that *Re Stimpson* is only authority for the proposition that the life interest may in some cases be forfeited; whereas if *Re Stimpson* is authority for anything, it is for a rule that consent does forfeit. Second, it suggests that it is more usual for consent to the exercise of the statutory power not to cause a forfeiture, a proposition for which it cites *Re Hodgson*. That case was, of course, decided at a date when there was no statutory power, and its relevance would therefore be doubtful. But if it is relevant at all it could only be so if the express power there had been in terms substantially the same as those of the statutory power. Actually they were different in a material particular; the statute gives a power to advance and then cuts it down by three provisos, the last of which prohibits its exercise without the consent of "any" person entitled to "any" prior interest. In *Re Hodgson*, on the other hand, the power was one to advance *with the consent of the protected life tenant*. Obviously where there is an express provision of this sort there is an implied provision that the giving of consent is not to cause a forfeiture, and so Neville, J., held. But that is no authority for a like conclusion in relation to the statutory power or any other similar powers, where the special case of a prior protected life interest is not dealt with.

Re Stimpson may be wrong, and is certainly an unfair and very tiresome decision, reported in the most inconvenient way. But I am inclined to think it is right, for this reason: the power of advancement is in the Trustee Act, s. 32; the very next section defines the meaning of "protective trusts." It is there expressly provided that an advance is not to work a forfeiture. If the framers of the Act did not mean s. 32 to be construed as it was in *Re Stimpson*, why did they frame s. 33 to meet the precise contingency?

In any event, as I have already said, it would not be safe to treat *Re Stimpson* as wrong.

To sum up the matters here discussed.

(1) Proviso (*c*) does not make necessary the consent of any member of a class of objects of a prior discretionary trust in any case where the *Re Smith* position has not arisen (*Re Beckett*).

(2) Where the *Re Smith* position has arisen, it would be unsafe to assume that the consent of all the objects is not necessary.

(3) A protected life tenant *can* consent to the exercise of the power.

(4) If his interest arises under the statutory protective trusts or a trust similarly worded which expressly provides against forfeiture, there will not be a forfeiture.

(5) If it arises under a trust which impliedly provides against forfeiture (as in *Re Hodgson*) there will not be a forfeiture.

(6) In any other case there will be a forfeiture, unless *Re Stimpson* is overruled, which is not likely.

Mr. Charles Dale, Clerk to the Registrar at Willesden County Court, is retiring after fifty-one years in the county court service.

Landlord and Tenant Notebook.

War Damage and Dilapidations.

PREMISES demised by a repairing lease are out of repair, and the lease is about to expire; the landlord instructs his surveyors, who prepare the usual schedule of dilapidations. Before the issue of a writ the premises are destroyed by enemy action. What is the effect, if any, on the tenant's liability; and does the answer depend on whether the destruction occurred before or after the expiration of the term?

Consideration of these questions involves examination of two enactments in particular: the Landlord and Tenant Act, 1927, s. 18 (1), and the Landlord and Tenant (War Damage) Act, 1939, s. 1 (1) and (2). In setting out these provisions, I will italicise words which appear to be of special significance in connection with the problems.

Landlord and Tenant Act, 1928, s. 18 (1), runs: "Damages for a breach of a covenant or agreement to keep or put premises in repair *during* the currency of a lease, or to leave or put premises in repair *at the termination* of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished *owing to the breach* of such covenant or agreement; and in particular *no damage* shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair *at the termination* of a lease, if it is shown that the premises, in whatever state of repair they might be, *would* at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

The Landlord and Tenant (War Damage) Act, 1939, s. 1 (1), says: "Where, by virtue of the provisions (whether express or implied) of a disposition . . . an obligation . . . is imposed on any person to do any repairs in relation to the land comprised in the disposition, those provisions shall be construed as not extending to the imposition of any liability on that person to *make good* any war damage occurring *to the land so comprised*." Subsection (2) reads: "Where war damage occurs to land *comprised* in a disposition, then, in so far as *compliance* with an obligation to repair, *as modified* by the provisions of the preceding subsection, is, having regard to the extent of the war damage—(*a*) impracticable, or only practicable at a cost which is unreasonable in view of all the circumstances; or (*b*) of no substantial advantage to the person who, but for the provisions of this subsection, would be entitled to the benefit of the obligation; the obligation shall be *suspended* until the war damage *is made good* to such an extent that compliance with the obligation is practicable at a reasonable cost *and* is of substantial advantage to the person entitled to the benefit thereof."

Taking first the case of destruction by enemy action after the expiration of the term, I think that neither enactment affords the tenant with any answer to the claim for dilapidations. The L.T.A., 1927, s. 18 (1), was passed to dispose of the law exemplified by such cases as *Rawlings* v. *Morgan* (1865), 18 C.B. (N.S.) 776, and *Inderwick* v. *Leech* (1884), 1 T.L.R. 484, which showed that it was no defence at common law to prove that the repairs would have been or would be useless to the landlord when he meant to pull the premises down and build something else. The wording of L.T.A., 1927, s. 18 (1), shows that the draftsmen exercised sound imagination, anticipating any evasion of the new rule by conveying the reversion to a third party. "Damages" and "the premises" are made the subjects of the sentences, not "the landlord." Also, they took cognisance of the fact that while dilapidation proceedings are normally launched after the lease has expired, there is nothing to prevent an action being brought on the repairing covenants, other than the covenant to yield up, before the term ends. If they did not at the time visualise the possibilities of aerial bombardment, they are hardly to be blamed; but even here, the use of the expression "pulled down" rather than "demolished" is apt, for the former is inappropriate to the case of destruction by bombing. Further the "would" in the phrase "would at or shortly after the termination of the tenancy have been or be pulled down," while it results in a certain amount of clumsiness, does at least suggest a conscious intention relating to specific premises. Hence, while the possibility of destruction may have been present when the lease ran out, it does not appear that L.T.A., 1927, s. 18 (1), affords any answer to the claim when premises are "bombed" after term expired.

If the tenant were then to seek to invoke the Landlord and Tenant (War Damage) Act, 1939, I think the short answer, in the case of destruction occurring after the expiration of the lease, would be that the Act does not touch the case; for the war damage did not occur to land comprised in a disposition, as the concluding words of s. 1 (1) and the opening words of s. 1 (2) demand.

But if the bomb strikes the premises and goes off before the lease comes to an end, the position is different. As to L.T.A., 1927, I consider that, apart from the consideration that the "would" in s. 18 (1) connotes deliberate intention to pull down the premises by someone entitled to do so, the second part of the subsection would not apply, for "at the termination of" the lease must mean not before that termination; further, the limitation on damages imposed by the general and earlier part of the subsection is itself limited by the words "by which the value of the reversion . . . is diminished . . . *owing to the breach* of such covenant or agreement." Hence, the right which a landlord would have to so much for dilapidations is not affected by the diminution of the value of the reversion brought about by enemy action. This, I think, is where the Landlord and Tenant (War Damage) Act, 1939, s. 1 (1) and (2), in particular subs. (2), become important. The first subsection merely absolves the tenant from any duty to make good the war damage; but he may already be liable to pay damages for dilapidations which have nothing to do with war damage. The second subsection, though, directs consideration to two questions: Is repair impracticable (or only practicable at an unreasonable cost), and is repair of any substantial advantage to the covenantee? If *either* condition obtains, the obligation under the covenant is, while not disposed of, suspended until the war damage itself is made good and is made good to such an extent that compliance is practicable at a reasonable cost *and* is of substantial advantage to the covenantee. It follows then that while (subject to anything that may happen if he disclaims) the tenant's liability is not destroyed, he is not likely to be troubled by it if, as in the cases which led to the passing of the other statute, L.T.A., 1927, s. 18 (1), the landlord decides to use the site for the erection of quite a different class of building.

It also follows that if a delayed action bomb should land in demised premises soon before the term is to end, much may depend on what happens in the period that remains.

Our County Court Letter.

Contract for Board and Lodging.

In *Preece* v. *Horne*, recently heard at Cheltenham County Court, the claim was for £7 13s. for a week and five days' board and lodging, at £4 10s. a week, provided for the defendant and his wife. The counter-claim was for damages for breach of contract, whereby the defendant (in consequence of being given a moment's notice to quit) had been forced to take other apartments at a higher price. The plaintiff's case was that complaints from her other lodgers had been received in consequence of the defendant, his wife and two others playing cards until late at night. The plaintiff had therefore turned off the light from the cellar, and remonstrated with the defendant next morning. The defendant and his wife then left. The defendant's case was that the terms included service, but his wife had to fetch their food from the kitchen. The plaintiff also constantly abused the defendant and his wife, and gave them no privacy. His Honour Judge Kennedy, K.C., held that the defendant must have known that he was entitled to notice before being required to leave. An opportunity to find other accommodation at the same price would then have arisen, and the increased cost of accommodation obtained at short notice was irrecoverable. Judgment was given for the plaintiff on the claim and counter-claim, with costs.

Boundary Dispute.

In a recent case at Nuneaton County Court (*Perry* v. *Turner*) the claim was for £50 as damages for trespass, and also for an injunction to restrain the defendant from entering the plaintiff's premises and erecting a fence. The counter-claim was for £10 as damages and for an injunction to restrain the plaintiff from demolishing a fence. The case for the plaintiff was that the eastern boundary of his property adjoined the defendant's land, upon which two houses had recently been built. The south-west and eastern boundaries were constituted by a hedge and ditch, both of which belonged to the plaintiff. In 1939, as a preliminary to building, the defendant grubbed up the hedge and filled in the ditch. In January, 1940, the defendant erected a wooden fence, which the plaintiff pulled down, as he had never agreed to its erection. Old inhabitants gave evidence that the ditch had been on the side of the hedge nearest the defendant's new houses, from which the inference was that the hedge was on the land of the plaintiff. The defendant's case was that he had known the land for twenty years, and no ditch was ever there. The hedge was 6 feet 3 inches from the new houses, and no one had ever trimmed it. The hedge had accordingly been grubbed up, as the plaintiff had agreed to the erection of a wall, for which purpose bricks had been brought on to the site. There was no trespass, as the fence had been erected on the defendant's own land. His Honour Judge Donald Hurst held (after a view) that there had been no encroachment by the defendant. The evidence of the existence of a ditch was not accepted, and there was no bulge in the hedge (in the direction of the defendant's land) as shown in the plaintiff's plan. Judgment was given for the defendant on the claim, and also on the counter-claim for 40s. damages, an injunction, and costs.

Practice Notes.

Administration of Enemy Alien's Estate.

"If . . . by reason of other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion, . . . appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit" (Administration of Justice Act, 1928, s. 9 (*b*)) amending Judicature Act, 1925, s. 162.

During the last war it had been decided that when, by reason of war, the executor or beneficiaries had become enemy aliens, the Public Trustee was entitled to apply for a grant of administration *ad colligenda bona*. The relevant section, 73, of the Court of Probate Act, 1857, is now s. 162 of the Supreme Court of Judicature Act, 1925. See *In the estate of Schiff* [1915] P. 86; *In the Estate of Grundt* [1915] P. 126.

In two recent cases before the President, one dealing with the estate of an Italian, the other dealing with the estate of a Dutch subject, each an enemy alien who had left property in England, the Public Trustee moved the court for grants *ad colligenda bona* to include limited powers of actual administration. (The Public Trustee is also the custodian of Enemy Property.) *In the Estate of Sanpietro*; *In the Estate of Van Tuyll van Serooskerken* (*Baron*) (1940), 4 All E.R. 482.

Sir Boyd Merriman, P., held that since, under the wide words of the above section, a creditor could obtain an unrestricted grant of administration, there was also power to modify the strictness of a grant *ad colligenda bona* (*In re Fischer* (1940), 2 All E.R. 252). Hodson, J., made a grant to a German resident in England, with the proviso that he make a return to the Custodian and transfer no part of the estate or proceeds to his family abroad.

In the first case, Fanny Sanpietro, an Englishwoman, married an Italian in 1878. He died in 1891. In March, 1939, before Italy entered the war, the widow died intestate, leaving two out of five children surviving, who were born and resident in England. They became entitled to a reversionary interest in a trust fund in England which now fell into possession, amounting to £3,700 in investments. They had executed a power of attorney to English solicitors to obtain administration, who had disbursed £600 in *estate duty* and had incurred *costs, both before and after the entry of Italy into the war*. Costs were incurred in and about the present motion after the power of attorney had become void under the Trading with the Enemy Act, 1939. The President gave the Public Trustee power to reimburse the solicitors the estate duty and the costs incurred both before and after 11th June, 1940.

Baron Van Tuyll van S., a Dutchman domiciled in Holland, was residing in England when he died in January, 1940. His sole executor was a brother living in Holland. In March, 1940, before the subjugation of Holland, the executor had given a power of attorney to London solicitors to obtain administration. They had paid *estate duty*, and the day before the invasion lodged the papers in Somerset House. Under the will, the widow took a life interest in the English property, worth £12,000; after her death, it went to beneficiaries, including the executor and his children—these being enemy aliens. The President gave the Public Trustee power to reimburse those persons who had paid certain *debts* of the deceased in England, and the *expenses of illness and funeral expenses* (£173 in all); power to pay the *solicitors' costs* incurred both under the power of attorney and later; and also *power to pay the widow the income* from the English estate. The latter power was subject to the consent of the Trading with the Enemy branch of the Treasury and of the Board of Trade.

The President ruled that applications for *simple grants ad colligenda* might be made, on affidavit, to the Principal Probate Registry. But where *special powers* are requested the motion should be made in open court to a judge.

To-day and Yesterday.

Legal Calendar.

3 February.—When Lord Wellesley went to Ireland as Lord Lieutenant his policy gave deep offence to the extreme Protestants represented by the Orange lodges. A grave incident occurred when his enemies organised a riot in the Theatre Royal in Dublin during a performance attended by him. Shouts and whistles filled the air. There were cries of "A groan for Popish Wellesley," and a heavy bottle was thrown at his box. On the 3rd February, 1823, six men were tried in the King's Bench for participation in the planning of the disturbance. From seven in the morning, two hours before the doors were opened, the avenues to the court were crowded with expectant spectators, including robed barristers, and the concourse was alarming. Political feeling was high and on the sixth day of the hearing it was found that the jury could not agree.

4 February.—When Archbishop Benson preached the Assize sermon at Oxford on the 4th February, 1891, there was a controversy as to precedence between him and Lord Chief Justice Coleridge. The difficulty was handled by an arrangement that they should arrive and be escorted to their places separately. The subject of the sermon was humility and it contained the following passage: "May I not speak in this presence of the veneration with which England has ever regarded her great judges on this account that the love of justice has been continuously felt to be a passion with them, a high atmosphere in which egotism has shrunk and faded. 'I magnify my office' is the language of one who esteemed himself 'less than the least.'"

5 February.—On the 5th February, 1781, Lord George Gordon was brought from the Tower of London to Westminster Hall to be tried for promoting the anti-Catholic Gordon Riots, when the mob, burning and pillaging, for a time took possession of London. He came in a coach attended by the Governor, the Gentleman Gaolor and two of his own servants. Nine carriages accommodating members of his family followed. Thirty foot soldiers and twelve warders guarded him. He arrived at the Hall at about a quarter to nine. The crowd there was very large but orderly, and the great number of constables who came to keep order had no violence to deal with. Thanks to Erskine's powerful advocacy Gordon was acquitted.

6 February.—There was a hard case in the Court of Exchequer on the 6th February, 1784, when a stage coach proprietor was condemned to forfeit his coach and four horses and to pay a penalty because the vehicle had been used to carry smuggled tobacco. Though it was proved that at the time of the offence he was ill in bed, it was held that he was nevertheless responsible for the act of his servant.

7 February.—On the 7th February, 1803, Colonel Despard was tried for high treason at the New Sessions House, Horsemonger Lane. His fate was a veritable tragedy for he had highly distinguished himself as a military engineer and as an administrator in the West Indies. Recalled on a frivolous charge in 1790, he had been kept hanging about the Colonial Office for two years before being told that there was no real accusation against him. Left without further employment, he grew disappointed and embittered and complained so violently and persistently that he was at last imprisoned. This treatment evidently unbalanced his mind and he set about hatching a plot to overthrow the Government by force. Though Lord Nelson, as an old comrade in arms, gave evidence in his favour, he was found guilty and executed.

8 February.—On the 8th February, 1821, Sir Francis Burdett was sentenced in the Court of King's Bench to pay a fine of £2,000. He had been found guilty at the Leicester Assizes of publishing a seditious libel, contained in an address to the Westminster electors, denouncing the Peterloo Massacre. It is said that the four judges assessed the amount by taking the average of what each thought correct. Best, J., who had at first wanted to say £20,000, was persuaded to say £8,000. The other three each wrote £0.

9 February.—On the 9th February, 1854, Edward Carson, the son of an architect, was born at 25 Harcourt Street, Dublin.

The Week's Personality.

In the ranks of the Anglo-Irish whose work has so powerfully helped to shape the course of Ireland's history Edward Carson holds a place as great as any of his fellows. It would be interesting to speculate what would have been his place in the development of his nation had he followed his early inclination towards a career in the Church or had his father allowed him to embrace his own profession as an architect. Sometimes as a youth he would work out a drawing in the paternal office, but his father would say: "You're doing this better than I did when I was older than you, but you're not to go on with it. You're to be a barrister." So a barrister he became and despite delicate health and a weak heart he achieved in the courts a reputation which placed him among the great advocates of all time. A compelling personality, a striking appearance, a capacity for steady work and an unconquerable combativeness when his sense of justice was roused gave his style a unique quality both at the Bar and in the political arena. Even his opponents could not withhold the tribute of their praise. "Although a Unionist he was never un-Irish," said Tim Healy, the first Governor-General of the Irish Free State. And again: "I would trust my soul to Carson." "A very Bayard both of the Bar and of public and private life," wrote Lord Reading; and Sir John Ross said: "I do not believe that any 'honour,' any money or any other human inducement could tempt Carson to any course that he deemed unworthy or dishonourable."

A Long Effort.

For a litigant in person to succeed in addressing the Court of Session in Edinburgh for eight days must surely be a record, and with that addition to her varied experiences the American actress who achieved it must console herself for the loss of her case. No doubt a court is less appreciative than a "public," and another time she may consider whether, despite her many charms, a shorter performance might not win surer applause.

"Where's the voice, however soft,
One would hear so very oft?"

"Be brief" is the moral of many an incident in the Courts of England, but from those of her native land comes the tale of the unimpressed Chicago judge who had occasion to warn a young lady: "Be careful. You'll talk yourself into gaol." "If I do that," she retorted, "I can talk myself out again." So the judge imposed a fine of a hundred dollars to be worked out in the local Bridewell. "You can start preparing that speech right now," he said. A note by Darling, J., on women at law has some bearing on the point of brevity: "It is characteristic of women that they think everything they can say to be very material . . . Women are invariably angry in the witness box, for the rules of evidence happen to be peculiarly repressive of feminine conversation, wherefore they look on them as prominent examples of the laws designed for the subjection of their sex."

Fitting the Crime.

From the United States comes another of those delightful applications of practical justice which brighten the administration of the law over there. Four students of California University were brought before the judge for dropping paper bags full of water on the heads of passers by. The judge gave them the alternative of submitting to the same treatment or paying a fine, but they elected to suffer the water-bag punishment, and the judge instructed the bailiff to provide himself with plenty of ammunition. The ingenuity of the American bench in such matters is remarkable. Not long ago four boys brought to justice on complaints dealing with the misuse of firecrackers were sentenced to memorise the Lord's Prayer, which they could not say. And adults have been condemned to attend a series of sermons and repeat a synopsis of what they heard.

Correspondence.

[The views expressed by our correspondents are not necessarily those of The Solicitors' Journal.]

The War Damage Bill.

Sir,—The Government's bill to compensate owners of buildings and other immovable property for damage caused by enemy action contains several clauses which ought to be amended.

It appears that, whilst the owner will be legally compelled to pay the fixed contributions or "premiums," nothing in the Bill will give him a legal right, where damage has taken place, to receive compensation at any fixed time.

Also, it is unfortunate, for several reasons, that Sched. A assessments should be utilised, for the first time, for other than income tax purposes, as is proposed by the Bill. For years, advocates of a capital levy, and those who demand that land or site values be taxed, have clamoured for the imposition of additional burdens on Sched. A taxpayers.

And the Bill has been framed as if the contributions to be paid by property owners are an additional tax upon Sched. A taxpayers. Thus the Bill may be used as a precedent for singling out Sched. A taxpayers for penal taxation by a future administration of a different political complexion.

Moreover, the Sched. A assessments are inclusive of the annual value of the land upon which a building is erected, but the land itself can neither be destroyed nor damaged by enemy action. It is difficult to find justification for levying compulsory contributions, founded to a great extent on annual land values, to form a fund for compensation to be given for damage to buildings by enemy action.

By virtue of cls. 4 and 5, again, there will first have to be an inquiry to determine the market value of a damaged building—on the basis of prices current at 31st March, 1939—before anyone can receive payment of compensation for damage done to a building.

Lincoln's Inn. JOSEPH BAKER.
25th January.

Solicitor's Practice in War Time.

Sir,—May I add three short notes to the useful letter of my friend, Mr. A. H. Goulty, in your issue of the 25th January, and to the President's address on the same subject at the meeting held on Friday, 24th January.

1. Only the solicitors' profession can assist the Government, the courts and the public by the administration of the vast output of legislation which, during the war, is being issued from Westminster and Whitehall, affecting every phase of commercial and human activity and completely changing the basis of the economic structure of the country.

2. With that patriotic fervour which was to have been expected, all solicitors and clerks who were not regarded as indispensable (and many who were) have already joined H.M. Forces. It is due to such of them as are spared that they do not find on returning to civilian life that their offices have had to close down for lack of the minimum staff to man them.

3. Much time and work, both at the Ministry of National Service and The Law Society, could be saved if, frankly recognising the national necessity, every solicitor could be allowed to retain, say, one-third of his pre-war male staff engaged on purely legal work, leaving it to the solicitor concerned to make and certify his selection according to his better knowledge of his clients' essential and urgent requirements.

London, E.C.4. CHARLES L. NORDON.
29th January.

Reviews.

A Treatise on the Law of Prize. By C. JOHN COLOMBOS, LL.D., of the Middle Temple, Barrister-at-Law. Second Edition, 1940. Demy 8vo. pp. xiii and (with Index) 387. London: The Grotius Society. Price 21s. net.

This delightfully written book combines practical value with academic interest. The author's terse and vivid style will be a boon to the men of action upon whom, in the first instance, the administration of the law of prize devolves. Politics, history and geography are all ingredients of this legal subject, and the professions of the law and of the sea are indebted to the learned author and to the Grotius Society for a scholarly production. The law of prize is a subject which has long periods of quiescence, with intervals of intense activity. The present is such an interval, and a second edition of this work has been necessitated, *inter alia*, by the passing of the Prize Act, 1939. This extends the application of prize law to aircraft, and to goods carried therein, in the same manner as it applies to ships and their cargoes, notwithstanding that the aircraft is on or over land. The increased participation of aircraft in naval warfare will be reflected in the judgments of Prize Courts, and the ensuing developments in the law will doubtless furnish the learned author with material for his third edition in due course. In the meantime, readers of this book—whether in comfortable libraries or in storm-tossed vessels afloat—will find the subject adequately dealt with in eleven chapters and 384 numbered sections. The pleasure of reading the book is enhanced by the clearness of the print, and the heavier type of the section headings makes for facility of reference.

Control of Aliens in the British Commonwealth of Nations. By C. F. FRASER. 1940. Demy 8vo. pp. 304 (with Index). London: The Hogarth Press. Price 12s. 6d. net.

This book deals in detail with the law as it is and the underlying principles of its administration in this country and in each Dominion: the landing of aliens, their public rights and duties as residents, their expulsion and their naturalisation. There is a special chapter on aliens in war time. The problem involves varying sentiments, conflicting interests and competing patriotisms. In criticising the finality of executive discretion in this country, the author leaves out of account the vigilance of the Press and the control of Parliament.

Notes of Cases.

COURT OF APPEAL.

Meyer *v.* Louis Dreyfus et Cie.

MacKinnon, Goddard and du Parcq, L.JJ. 24th September, 1940.

Procedure—Alien firm—Manager of English branch carrying on by licence of Board of Trade—Claim against firm for salary—Service of writ on manager valid—R.S.C. Ord. XLVIII, r. 3; Ord. XLVIIIA.

Appeal from a decision of Wrottesley, J., in chambers.

The plaintiff, Meyer, claimed £8,300 for salary from the defendants, a firm whose head office was in Paris. Their English branch in London was managed by one Gamburg under a power of attorney. France having concluded an armistice with Germany on the 22nd June, the Board of Trade permitted one Strass (appointed as his successor to act under the power of attorney by Gamburg, who died on the 5th July, 1940) to carry on the English business so long as no moneys were paid over to Paris or Vichy. All the assets of the firm in England became vested in the Custodian of Enemy Property. On the 28th June, 1940, Meyer's writ was served on Gamburg in London under R.S.C., Ord. XLVIII, r. 3, which provides "Where persons are sued as partners in the name of their firm under rule 1, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there. . . ." On the 4th July conditional appearance was entered for the four partners of the firm, who were in Paris. On a summons taken out by the firm, Master Mosely set aside the service, postponing it for the duration of the war. Wrottesley, J., affirmed that decision, and the plaintiff now appealed. It was argued for the defendants that as soon as Paris fell the partners and the partnership became enemy aliens, and all authority to Gamburg terminated forthwith; that Gamburg was no longer a person having the control or management of the partnership business in London; that at common law the agency was determined and was not revived by the licence from the Trading with the Enemy Branch of the Board of Trade to carry on the branch here, for that was not on behalf of the partnership; and that Gamburg's position was similar to that of a receiver appointed by the court who was the servant of the court and not of the partners. Reference was made to *In re Flowers and Co.* [1897] 1 Q.B., at p. 15, and *Tingley* v. *Muller* [1917] 2 Ch. 144. (*Cur. adv. vult.*)

MACKINNON, L.J., said that the truth was that Gamburg and his successors were allowed by the Custodian of Enemy Property, acting for the Trading with the Enemy Branch of the Board of Trade, to continue the English business. He (his lordship) was satisfied that in those circumstances Gamburg was carrying on the business of the partnership and had control of the partnership business of the defendants; and that, therefore, the service of the writ upon the defendant firm under Ord. XLVIIIA, r. 3, was properly effected. This was a pure technicality: It had been laid down in the last war that a person who was in effect an enemy, or who had technically become so, might yet be sued by an English subject in respect of a cause of action vested in that subject, subject to the difficulties of service. In *Porter* v. *Freudenberg* [1915] 1 K.B. 857, Ord. XLVIII, r. 3, had not come into question, because an individual was sued and not a partnership. There it was laid down that where an action was brought against an alien enemy resident in the enemy's country, who carried on a branch business in this country by means of an agent, leave might be given to the plaintiff to issue a concurrent writ, and to make substituted service of a notice of the writ by service of the notice upon the defendant's agent in this country. If the defendant here had been an individual and not a firm, the service of a concurrent writ on Gamburg would have been perfectly proper; and on the authority of *Porter* v. *Freudenberg*, *supra*, the initiation of these proceedings would have given to the plaintiff the right to come to the court. The alternative method under Ord. XLVIIIA, which was available, was equally applicable to service upon the manager of a partnership business. But service under Ord. XLVIII, r. 3, was also good. The contention that a manager was not carrying on the business of the partnership by reason of the operation of the common law about trading with the enemy was not valid when the manager was carrying on the business with the licence of the Crown, as delivered to him by the Board of Trade or its officer. The appeal must be allowed.

GODDARD and DU PARCQ, L.JJ., agreed.

COUNSEL: *Sir Robert Aske*, K.C., and *Scott Cairns*; *Cyril Miller*.

SOLICITORS: *Dehn & Lauderdale*; *Richards, Butler & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Sothern-Smith *v.* Clancy.

Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ. 13th December, 1940.

Revenue—Income tax—Annuity—Lump sum paid to insurance company—Guarantee by company that total of annual sums paid would at least equal amount of premium—Death of annuitant—Continuation of annual payments to his sister under contract—Whether capital or income—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D.*

Appeal from a decision of Lawrence, J. (84 SOL. J. 621; 56 T.L.R. 858).

By a contract made in December, 1928, one Sothern paid a sum of money called "capital invested," by way of premium to an insurance company, who undertook to pay him £6,510 a year for his life. The company guaranteed that the total of the annual sums thus paid might exceed, but would not be less than, the "capital invested." If at the annuitant's death the total of annual sums paid equalled or exceeded the "capital invested," the contract was at an end. If it did not, the company was to continue making the annual payments to the annuitant's sister (the appellant), or, if she were dead, to the annuitant's widow, until the total annual payments equalled the "capital invested." If both annuitant and beneficiary died before that sum was equalled, annual payments were to be continued to the personal representatives of the last survivor of the annuitant and beneficiary until the amount of the "capital invested" was reached. The annuitant having died before the "capital invested" had been equalled by the annual payments made, the company continued annual payments to the appellant. For each of the three years ending on the 5th April, 1938, assessments to income tax were made on the appellant which included the amount of the annuity thus paid to her. She objected, contending that the annual payments were not income but instalments of a fixed capital sum consisting of the "capital invested" under the contract, less the total of annual sums paid to the annuitant, i.e., the balance payable under the contract. It was contended for the Crown that the annual sums were income assessable under Sched. D to the Income Tax Act, 1918. The Commissioners for the Special Purposes of the Income Tax Acts held that the payments were income, and that the fact that in the events which had happened the company's liability was limited to the amount of the "capital invested" did not alter the nature of the payments. Lawrence, J., reversed that decision, and the Crown now appealed. (*Cur. adv. vult.*)

Sir WILFRID GREENE, M.R., said that it was clear from the relevant provisions of the Act of 1918 that an annuity or other annual payment was struck with tax as being an "annual profit or gain." That was why it was necessary to examine the nature of an annual payment to see whether it was really income or capital. It was no doubt true that in order to answer the question the real nature of the transaction must be ascertained, a proposition which had a deceptive appearance of simplicity. The "real nature" might be regarded from the legal or the financial point of view, the latter at once raising difficulties. If to periodical repayments of a capital sum there were added an element of interest, that element would attract tax (*Scoble* v. *Secretary of State for India* [1903] A.C. 299. In the simple case of a contract whereby A made a single payment and B undertook in return to pay him an annuity for a number of years, the property in the sum passed to B absolutely, being replaced by his promise to pay the annuity. Looking behind the legal to the financial nature of the transaction, it showed that at the end of the period A would have received an amount equal to his capital, plus an addition for interest; and if each annual payment were charged with tax he would in one sense be paying tax on capital. Nevertheless, it had always been assumed that such payments were liable to tax, e.g., *Coltness Iron Co.* v. *Black* (1881), 1 T.C. 287, at p. 308; *Jones* v. *Inland Revenue Commissioners* (1920), 1 K.B. 711, at pp. 714, 715; and *Scoble* v. *Secretary of State for India*, *supra*. In *Perrin* v. *Dickson* [1930] 1 K.B. 107, on the other hand, the Court of Appeal had felt at liberty to hear extrinsic evidence as to the method of calculating the payments in question. There was a basic distinction between an annuity for a term of years and a life annuity, in that in the latter case the total of the annual payments might prove to be more or less than the original lump sum payment, while in the former case it would be the same with the addition of interest. On that basis, *Perrin* v. *Dickson*, *supra*, would have been a clear case; but he (his lordship) did not feel free in that court to adopt any such principle. He felt bound to regard the purchase of an annuity for a term as the purchase of an income, and the whole of the income so purchased as a profit or gain, notwithstanding the way in which the payments were calculated. The sum paid for the annuity had ceased to exist, and the fact that at the end of the period the payee would have received at least as much as he had paid was irrelevant, nor could it make any difference that that result was stated on the face of the documents. The present contract was for the payment of an annual sum for an ascertainable period or for that of Sothern's life, whichever might be longer, there being no debt or anything analogous to it. The sum paid by Sothern was referred to in the contract only in order to put a term to the liability to pay the annual sum. The sums paid to Sothern were payments of a life annuity. In the events which had happened further annual payments had had to be made for a fixed period. The fact that that period was ascertained by reference to the capital sum paid by Sothern and to the amounts received by him during his life could not make the further payments anything different from the ordinary payment of an annuity for a fixed term. There was nothing in *Perrin* v. *Dickson*, *supra*, to compel a different conclusion. He (his lordship) could not accept Lawrence, J.'s view that the capital sum had never ceased to exist. The appeal would be allowed.

CLAUSON and GODDARD, L.JJ., agreed.

Leave was given to appeal to the House of Lords.

COUNSEL: *The Attorney-General* (Sir Donald Somervell, K.C.), and *R. P. Hills*; *King*, K.C., and *Mustoe*.

SOLICITORS: *The Solicitor of Inland Revenue*; *Scott & Son*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

HIGH COURT—CHANCERY DIVISION.

Re Hurd, Stott *v.* Stott.

Farwell, J. 22nd January, 1941.

Will—Bequest to child of testatrix—Child dies in 1923 *intestate leaving issue—Testatrix dies in* 1939*—Whether next-of-kin of child under the old law of distribution or the new entitled—Wills Act*, 1837 (7 *Will.* 4, *and* 1 *Vict.*, *c.* 26), *s.* 33.

Adjourned summons.

The testatrix, by her will, dated the 30th January, 1923, gave all her residuary estate to her executors upon trust to sell and to divide the same between her daughter S and certain other children, first giving to S any land which belonged to their father. The daughter S died intestate on the 20th September, 1923, leaving issue. The testatrix died in 1939. This summons was taken out by the executor of the testatrix to have it determined (*inter alia*) whether, having regard to s. 33 of the Wills Act and the death intestate of S in 1923, any interest in the residuary estate of the testatrix which devolved upon the personal representatives of S was to be distributed by them, according to the law in force before 1926 or in accordance with the provisions of the Administration of Estates Act, 1925. The Wills Act, 1837, s. 33, provides: "Where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator; unless a contrary intention shall appear by the will."

FARWELL, J., said, reading the words of s. 33 literally, S must be assumed to have survived the testatrix, with the result that the property given to her must be administered in accordance with the law in force at that date. That was not the true effect of s. 33. Instead of the gift lapsing, it became part of the estate of S on the footing that she was alive at the death of the testatrix and therefore that she was a person to whom the gift could be given. Although she was deemed for the purpose of making the gift effective to be alive in 1939, none the less the gift became part of her estate. That estate was administered in accordance with the law of intestacy in force at the date of her death in 1923 and the property she took under the will of the testatrix must be administered in the same way. A difficult position might arise if this were not the true effect of the section. For instance, if an inquiry was ordered to discover the next-of-kin at the death, and the estate subsequently became increased by a gift taking effect under s. 33, a further inquiry would be necessary to ascertain the next-of-kin at the date at which the beneficiary was deemed to have died.

COUNSEL: *Jennings*; *Reid*; *Richmount*.

SOLICITORS: *Stileman, Neate & Topping*, for *Harris & Harris*, Wells.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

Hopkins *v.* Jotcham.

Viscount Caldecote, C.J., Hawke and Humphreys, JJ.
5th November, 1940.

Licensing—Permitted hours—Justices' exemption—Order—Exemption for "each cattle-market to be held hereafter"—"Regular cattle-market"—Meaning—Auction sales of cattle held on days other than usual market day—Not included in order—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 55.

Appeal by case stated from a decision of Gloucestershire Justices.

An information was preferred by the respondent Jotcham, complaining that the appellant Hopkins, the licensee of the Bell Hotel, Moreton-in-the-Marsh, had, on the 30th January, 1940, unlawfully supplied to a person in the hotel intoxicating liquor otherwise than during the permitted hours relating to those premises. At the hearing of the information the following facts were established: On the 30th January, the appellant supplied intoxicating liquor at 3.30 in the afternoon to five customers in the smoke-room of the hotel, where they were found by the police. At the date in question there was in force a general order of exemption under s. 55 of the Licensing (Consolidation) Act, 1910, made by justices for the Moreton-in-the-Marsh Petty Sessional Division. The order, dated the 31st October, 1921, stated that the justices, "being of opinion that it is necessary and desirable to do so on the occasion of each regular cattle market at Moreton-in-the-Marsh," thereby granted the licensee of the premises in question, they being in the immediate neighbourhood of the cattle market, an order exempting her from the provisions of the Act of 1910 as to non-permitted hours in respect of the hotel between the hours of 2 p.m. and 6 p.m. "on the occasion of each cattle market to be held hereafter." Moreton-in-the-Marsh cattle market had been in existence for many years, being held on the second Tuesday in each month. After 1921 a firm of auctioneers acquired the market rights and constructed a sale-yard near the railway station, but the market continued to be held on the second Tuesday in each month up to and including the 9th January, 1940. In January, 1940, the Government took control of the distribution and sale of fat

stock, and ordered the auctioneers to hold gradings of fat stock in their market once every fortnight. General grading in the country began on the 15th January, 1940, and the auctioneers accordingly decided to hold fortnightly auction sales on the same days as the fortnightly gradings. In pursuance of that decision they arranged to hold a market for the sale of livestock by auction on the 30th January. The market was duly advertised in the Press, and livestock was sold in the same way as at the monthly markets. It was contended for the licensee (1) that the market thus held on the 30th January was within the true legal meaning of the exemption order a "cattle market"; and (2) that, assuming the exemption granted to apply only to "the occasion of each regular cattle market," the market held on the 30th January, 1940, was such an occasion. It was contended for the informant that on the true construction of the exemption order the licensee was exempted only on the occasion of each regular cattle market held at Moreton-in-the-Marsh, and that, the market held on the 30th January not being a regular cattle market, the licensee was on that day not exempted from the duty to close her hotel between 2 p.m. and 6 p.m. The justices held that the exemption order was intended to apply only to the regular market held on the second Tuesday in each month, and convicted the licensee, fining her £2, with £1 1s. costs. The licensee appealed.

VISCOUNT CALDECOTE, C.J., said that the case raised an interesting point. Section 55 of the Licensing (Consolidation) Act, 1910, allowed justices on such evidence as they deemed "sufficient to show that it is necessary or desirable to do so for the accommodation of any considerable number of persons attending any public market" [to] "grant . . . to the holder of any justices' on-licence, in respect of premises in the immediate neighbourhood of that market . . . an order . . . exempting that person from the provisions of this Act as to general closing hours on such days and during such time . . . as may be specified in the order. . . ." There was no doubt that the justices were intending in their exemption order to specify the actual market held on the second Tuesday in each month at Moreton-in-the-Marsh, and they designated it by the expression the "regular cattle market," on the occasion of which they thought it necessary and desirable to exercise their powers under the section. In his opinion, only one construction of the justices' order was possible. When in the latter part of the order the justices granted the exemption "on the occasion of each cattle market to be held hereafter," they meant exactly what they had meant by the expression "regular cattle market" in the first part of the order. That was really the only question on which the justices had decided this case, and they had come to a correct conclusion in point of law. Counsel for the appellant had further argued that, if the word "regular" were read into the last sentence of the exemption order, that would mean "each proper cattle market to be held hereafter." In his (his lordship's) opinion, that was not the meaning of the words "each regular cattle market" as used in the first part of the order. The appeal must be dismissed.

HAWKE and HUMPHREYS, JJ., agreed.

COUNSEL: *Willes; Astell Burt.*

SOLICITORS: *Gibson & Weldon*, for *H. Challen Sharp*, Moreton-in-the-Marsh; *Field, Roscoe & Co.*, for *Richard L. Moon*, Gloucester.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Obituary.

SIR FRANK MELLOR.

Sir Frank Mellor, a Registrar in Bankruptcy from 1917 to 1936 and from 1930 the Senior Registrar, died on Sunday, 2nd February, at the age of seventy-eight. He was called to the Bar by the Inner Temple in 1886, and joined the North-Eastern Circuit. In 1917 he was appointed a Registrar in Bankruptcy and, on the death of Sir Herbert Hope, in 1930, succeeded him as Senior Registrar.

MR. A. T. BUCKNALL.

Mr. Acton Thomas Bucknall, solicitor, of Northwood, Middlesex, died on Monday, 3rd February. He was admitted a solicitor in 1888.

DR. J. A. DIXON.

Dr. John Archbald Dixon, solicitor and senior partner in the firm of Messrs. J. A. Dixon & Son, solicitors, of Gateshead, died on Thursday, 23rd January, at the age of eighty-eight. Dr. Dixon was admitted a solicitor in 1874, and was Clerk to the Gateshead County Magistrates from 1912 to 1931. From 1911 to 1912 he was President of the Newcastle Incorporated Law Society.

MR. G. D. ELLIMAN.

Mr. George Drayton Elliman, former senior partner of Messrs. Dalston, Sons & Elliman, solicitors, of Southampton Street, W.C.1, died on Tuesday, 28th January, at the age of seventy-seven. He was admitted a solicitor in 1887.

MR. G. L. McKELVIE.

Mr. George Lockhart McKelvie, solicitor, of Messrs. Atkinson, McKelvie & Tyson, solicitors, of Whitehaven, died recently, at the age of seventy-three. Mr. McKelvie was admitted a solicitor in 1893. He also held the appointments of Registrar of the Whitehaven County Court and District Registrar of the High Court.

MR. N. G. MOORE.

Mr. Neville Gregory Moore, solicitor, of Tewkesbury, died recently, at the age of seventy-one. Mr. Moore was admitted a solicitor in 1892.

MR. J. PARKINSON.

Mr. Joseph Parkinson, solicitor, senior partner of Messrs. John H. Cooke & Sons, solicitors, of Winsford, Cheshire, died on Wednesday, 29th January, at the age of seventy-eight. He was admitted a solicitor in 1891 and, until two years ago, was Clerk to the Winsford Justices.

MR. J. P. F. SMITH.

Mr. Joshua Pritchard Fellowes Smith, solicitor, of Leek, died recently, at the age of seventy-four. Mr. Smith was admitted a solicitor in 1889.

MR. F. L. SUTTON.

Mr. Frank Lindsay Sutton, solicitor, of Messrs. Andrews, Purves, Sutton & Creery, solicitors, of Gt. James Street, Bedford Row, W.C.1, died on Wednesday, 29th January. Mr. Sutton was admitted a solicitor in 1895.

Parliamentary News.

PROGRESS OF BILLS.

HOUSE OF LORDS.

Camborne Water Bill [H.L.].	
Read First Time.	[29th January.
Cardiff Corporation Bill [H.L.].	
Read First Time.	[29th January.
Derwent Valley Water Bill [H.L.]	
Read First Time.	[29th January.
East Surrey Gas Bill [H.L.].	
Read First Time.	[29th January.
Mid Southern Utility Bill [H.L.].	
Read First Time.	[29th January.
Portsmouth Water Bill [H.L.].	
Read First Time.	[29th January.

HOUSE OF COMMONS.

Diplomatic Privileges (Extension) Bill [H.L.].	
Read First Time.	[30th January.
Ministry of Health Provisional Order (Shipley) Bill [H.C.].	
Reported, with Amendments.	[4th February.
War Damage Bill [H.C.].	
In Committee.	[4th February.

War Legislation.

(Supplementary List, in alphabetical order, to those published week by week in THE SOLICITORS' JOURNAL *from the 16th September, 1939, to the 1st February, 1941.)*

STATUTORY RULES AND ORDERS, 1940-41.

E.P. 106. **Apples** (Home Produced) (Maximum Prices) Order, 1940. Amendment Order, January 28, 1941.

E.P. 71. **Cold Storage** (Control of Undertakings) (Charges) Order, January 17, 1941.

E.P. 92. **Control of Timber** (No. 13) Order, 1940, Direction No. 5, January 23, 1941.

E.P. 80. **Control of Paper** (No. 30) Order, January 22, 1941.

E.P. 81. **Control of Coal Tar** Order, January 20, 1941.

E.P. 96. **Currency Restrictions** (Travellers Exemptions) Amendment Order, January 28, 1941.

E.P. 73. **Defence** (Finance) (Definition of Sterling Area) Order, January 22, 1941.

E.P. 102. **Delegation of Emergency Powers** (Northern Ireland) Order, January 23, 1941.

No. 94. **Factories** (Standards of Lighting) Regulations, January 14, 1941.

E.P. 82. **Feeding Stuffs** (National Priority Pigeon Mixture) Order, January 22, 1941.

E.P. 89. **Horticultural** (Cropping) (Approved Crops No. 1) Order, January 22, 1941.

E.P. 95. **Importation of Notes** (Exemptions) Amendment Order, January 28, 1941.

E.P. 76. **Limitation of Supplies** (Woven Textiles) (No. 4) Order, January 23, 1941.

E.P. 78. Limitation of Supplies (Miscellaneous) (No. 6) Order, January 24, 1941.

E.P. 103. **Local Authorities** (Community of Kitchens and Sale of Food in Public Air Raid Shelters) Order, January 28 1941.

E.P. 100. **Oat Products** (Control and Maximum Prices) Order, 1940. General Licence, January 27, 1941.
E.P. 107. **Oranges** (Maximum Prices) Order, 1940. Amendment Order, January 28, 1941.
No. 2213. **Ploughing Grants** Regulations, December 30, 1940.
E.P. 93. **Poultry** (Maximum Prices) Order, January 25, 1941.
E.P. 74. **Regulation of Payments** (General Exemptions) Order, January 22, 1941.
E.P. 75. Regulation of Payments (Belgian Congo and Ruanda-Mundi) Order, January 22, 1941.
E.P. 77. **Securities** (Restrictions and Returns) (Amendment) Order, January 22, 1941.
No. 2100. **Trade Union** Regulations, December 31, 1940.

[E.P. indicates that the Order is made under Emergency Powers.]

Draft Statutory Rules and Orders, 1941.

Teachers' Superannuation Amending Rules, January 24.

Stationery Office.

Emergency Statutory Rules and Orders, 1940 (still effective on January 1, 1941), List of.

Copies of the above S.R. & O.'s, etc., can be obtained through The Solicitors' Law Stationery Society, Ltd., 22, Chancery Lane, London, W.C.2, and Branches.

Legal Notes and News.

Honours and Appointments.

Mr. Justice Uthwatt has been appointed to exercise jurisdiction in company matters and matters relating to removals and appeals under the Guardianship of Infants Acts in the place of the late Mr. Justice Crossman.

Mr. H. S. Syrett, C.B.E., LL.B., has been elected Chairman of the City Lands Committee of the City Corporation. This position carries with it the title of Chief Commoner of the Corporation of London. Mr. Syrett was admitted a solicitor in 1901.

Notes.

Mr. Henry Thomas Weyman, who has died at the age of ninety, at Ludlow, Shropshire, had been a coroner for more than sixty-two years.

Sir William Barber has resigned the Chairmanship of the Magistrates of the Brentford Petty Sessional Division of Middlesex. He has been succeeded by Colonel Forrester Clayton.

Sir William Malkin, K.C., His Honour Judge Beazley, Mr. Wilfrid Clothier, K.C., and Mr. W. H. Cartwright Sharp, K.C., have been elected Masters of the Bench of the Inner Temple.

The offices of the Trading with the Enemy Branch (Treasury and Board of Trade) have been moved from Imperial House and Alexandra House, Kingsway, to 24, Kingsway, W.C.2. Telephone No.: Holborn 4300.

The Minister of Labour and National Service has made regulations prescribing standards of lighting in certain classes of factories, with an extended list of classes of works of a special character to which the regulations apply.

The Eastern Regional Commissioner (Sir Will Spens) has issued a direction, under the Fire Prevention Order, making fire-watching and fire-fighting arrangements compulsory in all business premises and private houses in most large towns in Bedfordshire, Cambridgeshire, Norfolk, Suffolk, and parts of Essex and Hertfordshire outside the Metropolitan area.

Law Association.

The usual monthly meeting of the Directors was held on the 3rd February, Mr. William Winterbotham in the chair. The other Directors present were Mr. Guy H. Cholmeley, Mr. Ernest Goddard, Mr. C. D. Medley, and the Secretary, Mr. Andrew H. Morton. The Secretary reported the result of the annual appeal to be one new life member, seventeen annual subscribers and £26 1s. donations; £127 was voted in relief of deserving applicants, and other general business transacted.

Binding of Numbers.

Subscribers are reminded that the binding of the Journal, in the official binding cases, is undertaken by the publishers. Full particulars of styles and charges will be sent on application to The Manager, 29/31, Breams Buildings, E.C.4.

Court Papers.

Supreme Court of Judicature.

Rota of Registrars in Attendance on

Date.	Emergency Rota.	Appeal Court No. I.	Mr. Justice Farwell.
	Mr.	Mr.	Mr.
Feb. 10	Jones	More	Blaker
,, 11	Hay	Blaker	Andrews
,, 12	More	Andrews	Jones
,, 13	Blaker	Jones	Hay
,, 14	Andrews	Hay	More
,, 15	Jones	More	Blaker

	Group A.		Group B.	
	Mr. Justice Bennett. Non-Witness.	Mr. Justice Simonds. Witness.	Mr. Justice Uthwatt. Non-Witness.	Mr. Justice Morton. Witness.
	Mr.	Mr.	Mr.	Mr.
Feb. 10	Hay	More	Andrews	Jones
,, 11	More	Blaker	Jones	Hay
,, 12	Blaker	Andrews	Hay	More
,, 13	Andrews	Jones	More	Blaker
,, 14	Jones	Hay	Blaker	Andrews
,, 15	Hay	More	Andrews	Jones

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 20th February, 1941.

	Div. Months.	Middle Price 5 Feb. 1941.	Flat Interest Yield.	† Approximate Yield with redemption.
ENGLISH GOVERNMENT SECURITIES.			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	110⅛	3 12 5	3 3 1
Consols 2½%	JAJO	77⅞	3 4 6	—
War Loan 3½% 1955–59	AO	101	2 19 5	2 18 2
War Loan 3½% 1952 or after	JD	103⅛	3 7 8	3 3 0
Funding 4% Loan 1960–90	MN	113¾	3 10 4	3 0 11
Funding 3½% Loan 1959–69	AO	99⅝	3 0 4	3 0 6
Funding 2½% Loan 1952–57	JD	98⅛	2 15 10	2 17 4
Funding 2½% Loan 1956–61	AO	92⅛	2 14 1	3 0 1
Victory 4% Loan Average life 20 years	MS	111	3 12 1	3 4 10
Conversion 5% Loan 1944–64	MN	108¼	4 12 6	2 3 4
Conversion 3½% Loan 1961 or after ..	AO	104⅛	3 7 0	3 3 10
Conversion 3% Loan 1948–53	MS	102xd	2 18 10	2 13 3
Conversion 2½% Loan 1944–49 ..	AO	100	2 10 0	2 10 0
National Defence Loan 3½% 1954–58 ..	JJ	101¼	2 19 3	2 17 9
Local Loans 3% Stock 1912 or after ..	JAJO	90	3 6 8	—
Bank Stock	AO	338½	3 10 11	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	91	3 5 11	—
India 4½% 1950–55	MN	109½	4 2 2	3 6 3
India 3½% 1931 or after	JAJO	96	3 12 11	—
India 3% 1948 or after	JAJO	83	3 12 3	—
Sudan 4½% 1939–73 Average life 18½ years	FA	109	4 2 7	3 16 3
Sudan 4% 1974 Red. in part after 1950	MN	107	3 14 9	3 2 8
Tanganyika 4% Guaranteed 1951–71 ..	FA	109	3 13 5	2 18 11
Lon. Elec. T. F. Corpn. 2½% 1950–55 ..	FA	93	2 13 9	3 1 9
COLONIAL SECURITIES.				
*Australia (Commonwealth) 4% 1955–70	JJ	105	3 16 2	3 10 11
Australia (Commonwealth) 3½% 1964–74	JJ	94	3 9 2	3 11 3
Australia (Commonwealth) 3% 1955–58	AO	94	3 3 10	3 9 1
*Canada 4% 1953–58	MS	110xd	3 12 9	3 1 3
New South Wales 3½% 1930–50 ..	JJ	100	3 10 0	3 10 0
New Zealand 3% 1945	AO	99	3 0 7	3 5 6
Nigeria 4% 1963	AO	107	3 14 9	3 11 1
Queensland 3½% 1950–70	JJ	100	3 10 0	3 10 0
*South Africa 3½% 1953–73	JD	102	3 8 8	3 6 0
Victoria 3½% 1929–49	AO	101	3 9 4	—
CORPORATION STOCKS.				
Birmingham 3% 1947 or after ..	JJ	83½	3 11 10	—
Croydon 3% 1940–60	AO	93	3 4 6	3 10 2
Leeds 3½% 1958–62	JJ	96	3 7 8	3 10 5
Liverpool 3½% Redeemable by agreement with holders or by purchase ..	JAJO	96	3 12 11	—
London County 3% Consolidated Stock after 1920 at option of Corporation ..	MJSD	85xd	3 10 7	—
*London County 3½% 1954–59 ..	FA	102	3 8 8	3 6 2
Manchester 3% 1941 or after	FA	83	3 12 3	—
Manchester 3% 1958–63	AO	95	3 3 2	3 6 2
Metropolitan Consolidated 2½% 1920–49	MJSD	98xd	2 11 0	2 15 1
Met. Water Board 3% "A" 1963–2003	AO	86½	3 9 4	3 10 9
Do. do. 3% "B" 1934–2003 ..	MS	89xd	3 7 5	3 8 6
Do. do. 3% "E" 1953–73	JJ	92	3 5 3	3 8 3
Middlesex County Council 3% 1961–66	MS	92xd	3 5 3	3 9 9
*Middlesex County Council 4½% 1950–70	MN	105	4 5 9	3 18 0
Nottingham 3% Irredeemable	MN	82	3 13 2	—
Sheffield Corporation 3½% 1968 ..	JJ	101	3 9 4	3 8 10
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture ..	JJ	105½	3 15 10	—
Great Western Rly. 4½% Debenture ..	JJ	113½	3 19 4	—
Great Western Rly 5% Debenture ..	JJ	122½	4 1 8	—
Great Western Rly. 5% Rent Charge ..	FA	118	4 4 9	—
Great Western Rly. 5% Cons. Guaranteed	MA	114	4 7 9	—
Great Western Rly. 5% Preference ..	MA	89	5 12 4	—

*Not available to Trustees over par.
† In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.